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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	Case Nos. 00-B-41065 (SMB)
RANDALL'S ISLAND FAMILY GOLF CENTERS, INC., et al.,	:	through 00-B-41196 (SMB)
	:	(Jointly Administered)
Debtors.	:	

DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO GARY GELMAN'S MOTION TO RECOVER BID DEPOSIT

The above-captioned debtors and debtors-in-possession (the "Debtors") submit this memorandum of law, and the exhibits thereto, together with the Affidavit of Charles B. Rich, sworn to on March 30, 2001, and the exhibits thereto ("Rich Affidavit" or "Rich Aff."), in opposition to the motion filed by Gary Gelman to recover his $100,000 bid deposit in connection with the lease for site 201 (Farmingdale/Skydrive) (the "Property").

Preliminary Statement

Gelman's motion displays a fundamental misunderstanding of the entire auction process authorized by the Court.

First, the notion that the Debtors "rejected" Gelman's bid is not only ludicrous, but misapprehends the court-approved solicitation for bids dated January 12, 2001 (the "Bidding

Procedures").[1] Under the Bidding Procedures, the contracts used for the assignment of real property leases or other real property transactions by the Debtors were Court-approved contracts that were not subject to negotiation by anyone, including the Debtors. This procedure was essential to ensure a "level playing field" by requiring all bidders to bid based on identical forms of contracts. When making his bid, Gelman submitted the form lease assignment agreement, and the Debtors did not, and were in no position to, make a "counteroffer" to it. Gelman's argument arising from the February 7 letter simply makes no sense in these circumstances. One look at the letter further defeats this argument, as it was merely an effort to notify Gelman that the Debtors were attaching the correct exhibits to Gelman's bid (which were omitted), thereby making it consistent with the Court-approved form.

Gelman also contends several times that the Debtors[2] should not have "submitted" Gelman's bid at the February 9, 2001 open outcry auction. This again misapprehends the auction process, and turns the facts on their head. It was Gelman who submitted a binding, irrevocable bid on or about February 5, 2001. The Debtors surely did not submit any bids on February 9 or at any other time (nor did their counsel).

Gelman's misunderstanding of the process is also evident from his procedural and "notice" arguments regarding the closing on the Property. The salient fact is that once Gelman repudiated his bid – and there is no dispute that this occurred – he forfeited the deposit and the

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[1] The Bidding Procedures are attached as Exhibit 1 hereto. The Court's Order, dated January 23, 2001, approving the Bidding Procedures (the "Order") is attached as Exhibit 2 hereto.

[2] Gelman's papers repeatedly refer to the undersigned law firm when they, in most instances, should refer to the Debtors.

Debtors were under no obligation to proceed with the time consuming and futile exercises of obtaining court approval of, and scheduling a closing for, a lease assignment to Gelman that would never occur. Such a procedure would in any event have made no sense, as the Debtors were endeavoring to dispose of more than 80 properties by February 28, due to the imminent expiration of their working capital funding. The Bidding Procedures and the Court's Order put Gelman on notice that his deposit would be forfeited if he defaulted, and the Debtors' counsel reminded Gelman's counsel of this. He thus has no legitimate basis to object.

Gelman fails to point out three undisputed facts, which clearly establish the Debtors' entitlement to Gelman's deposit:

(a) Gelman's bid was irrevocable. The Bidding Procedures approved by the Court and the Court's Order itself clearly state that bids are binding and irrevocable, and Gelman confirmed his understanding of this fact in his cover letter which accompanied his bid.

(b) Gelman revoked his bid. There is no dispute that on February 15, 2001, Gelman, through his attorneys, advised the Debtors that he was 'withdrawing' his bid and would not proceed with the transaction.

(c) Deposits are forfeited upon default by Successful Bidders. Paragraph 21 of the Bidding Procedures provides that where a Successful Bidder (defined in the Bidding Procedures to include a Back-up Bidder when the high bidder defaults) breaches his bid, the deposit is forfeited and may be retained by the Debtors. Gelman was the Back-up Bidder on the Property, who became the Successful Bidder after the high bidder defaulted. He forfeited his deposit when he too refused to proceed with the acquisition.

As the Debtors are entitled to retain the deposit based on undisputed facts, there are certainly no grounds for sanctions to be imposed against Debtors' counsel for Gelman's attorneys' fees or otherwise.

Background

The Bidding Procedures provide for "the submission of binding, sealed Bids in the form of the 'Required Bid Documents' (as described below)." Exh. 1 hereto, p. 4, ¶ 1. The Required Bid Document, for a lease transaction, is "an executed and fully completed copy of the Assumption and Assignment Agreement, the form of which is attached hereto as Exhibit C . . .". Id., p. 6, ¶ 4(c).

In accordance with the foregoing, on or about February 5, Gelman submitted a $1 million bid for the Property, together with the required 10% deposit. A copy of his cover letter, together with his Required Bid Documents for a lease transaction, are attached to the Rich Affidavit as Exhibit A.

Consistent with ¶ 4(a) of the Bidding Procedures, Gelman's cover letter states: "I understand that the offers are irrevocable until the earlier of (i) the Closing or (ii) thirty (30) days following the last date of the Auction, as adjourned." Id.; Gelman Aff. Exh. 1.[3] Pursuant to the Bidding Procedures, the bid was irrevocable (Exh. 1 hereto, p. 7, ¶ 5), and by submitting his bid, Gelman agreed to be bound by the Bidding Procedures. Id., p. 5, ¶ 2. See also Order at ¶ 18; Gelman's Bidder Registration Form contained in Rich Aff. Exh. A.

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[3] "Gelman Aff." refers to the affidavit of Gary Gelman, sworn to on March 21, 2001, submitted in support of his motion. "Kook Aff." refers to the affidavit of Mark. R. Kook, also submitted by Gelman on this motion. "Gelman Mem." refers to the Memorandum Of Law In Support Of Motion For An Order Directing The Return Of Bid Deposit filed by Gelman.

At the auction on February 9, 2001, no one made any bids on the Property. Accordingly, the Successful Bidder and Back-up Bidder were determined from the written bids submitted prior to the open outcry auction on February 9. Gelman had submitted the second highest bid, and therefore was the Back-up Bidder. Rich Aff. ¶ 6.

On February 15, 2001, Gelman was notified, through his attorney, that the highest bidder appeared to be defaulting, and that the closing likely would proceed with his Back-up Bid. The Debtors requested additional financial information to supply to the landlord at the Property for use in meeting the adequate assurance requirement. Rich Aff. ¶ 7 and Exh. C thereto.

Later that day, Gelman's attorney advised the Debtors that Gelman was repudiating his bid. This "withdrawal" was confirmed by fax from Gelman's attorney. Rich Aff. ¶ 8 and Exh. D; Kook Aff. Exh. 5.

Debtors' counsel advised Gelman's attorney, on more than one occasion, that Gelman's bid was irrevocable, and that Gelman could forfeit his deposit if he did not proceed with the lease assignment. Rich Aff. ¶¶ 8-9 and Exh. D.

Nonetheless, Gelman's attorney confirmed the repudiation, and instead argued for the return of the deposit if the Debtors received bids from third parties greater than or equal to Gelman's. Rich Aff. ¶ 9.

After both high bidders defaulted, the Debtors ultimately assigned the lease to a third party for $300,000 less than Gelman's bid.[4]

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[4] While Gelman claims ignorance of the status of the lease for the Property, the Order approving the lease assumption and assignment, signed on February 28, is number 935 on the Court's docket, which is available on the internet. The closing was held on February 28 and completed within the following week.

ARGUMENT

GELMAN REPUDIATED HIS BID AND FORFEITED HIS DEPOSIT

The Bidding Procedures approved by the Court state: "All Bids . . . shall remain open and irrevocable" until the earlier of the closing or 30 days after the Auction.[5] Exh. 1, ¶ 5. The Order restates this rule. See Exh. 2 at ¶ 19. The Bidding Procedures required all bids to "expressly state that the Bidder's offer is irrevocable" for the above time period. Exh. 1, ¶ 4(a). Gelman acknowledged his understanding that his bid was irrevocable in his cover letter accompanying the bid.

Notwithstanding the irrevocability of his bid, Gelman nonetheless withdrew his bid on February 15, after he was advised by Debtors' counsel that the highest bidder was defaulting, and that the Debtors therefore planned to proceed with the assignment to Gelman. His repudiation of the bid was confirmed by fax and in subsequent conversations with Debtors' counsel.

The Bidding Procedures, in paragraph 21, provide that a bid deposit is forfeited if the Successful Bidder defaults. "Successful Bidder" is defined to include the Back-up Bidder if the highest bidder defaults. Thus, the Debtors are entitled to retain Gelman's bid deposit in light of his default.

None of the arguments presented by Gelman, discussed below, can refute these facts, or enables him to avoid the forfeiture of his deposit.

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[5] The term "Bids" is defined at ¶ 1 of the Bidding Procedures as "bids for [the Debtors'] interest in each of the Assets . . .". It encompasses all bids, and is not limited to "Qualified Bids" or to bids made at the open outcry auction.

A. Gelman Submitted A Court Approved Lease Assignment Agreement That Was Not Subject To Negotiation

Gelman expends considerable effort asserting an argument based on common law contract principles that have no relevance to this dispute in this bankruptcy auction context. Specifically, he argues that the Debtors submitted a "counter-offer" to his "offer" which varied the contractual terms and thereby constituted a "rejection" of his offer. His bid, he contends, was therefore invalidated. See Gelman Mem. at pp. 4-9.

Gelman, however, overlooks the fact that the Debtors and Gelman were not negotiating the terms of a contract. The Court had approved a form Contract for Assignment of Lease or Concession (the "Lease Assignment"), which neither the Debtors nor Gelman had any authority to negotiate or alter. The entire auction process was controlled by the Court-approved Bidding Procedures, including the form contracts attached to them. See Exh. 1 hereto at Exh. C. The Bidding Procedures and attached forms of contract were available to Gelman and all bidders on Keen Realty's website, and were easily obtainable by downloading or by fax-back service. Gelman submitted the presented forms of Bidder Registration Form and an executed Lease Assignment, and the Bidding Procedures controlled what happened with that bid and contract.[6]

There are sound reasons why the Bidding Procedures require uniformity in the form of bids. Such uniformity creates a level playing field for all bidders, and makes it possible for the Debtors and the Court to evaluate which bid for a particular property is highest and best.

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[6] Indeed, the Bidding Procedures and the Order specifically provide that bidders, by submitting bids, are deemed to acknowledge that they are "bound by these Bidding Procedures," and this fact is repeated on the Bidder Registration Form as well. Exh. 1 hereto at ¶ 2; Exh. 2 hereto at ¶ 18; Rich Aff. Exh. A. Gelman acknowledges that he submitted his bid pursuant to the Bidding Procedures (Gelman Aff. ¶ 2), and, under the Bidding Procedures, his bid was "binding" and "irrevocable".

Were the forms of contracts attached to the Bidding Procedures merely starting points for further negotiation, (i) the Debtors would have been in an impossible situation of having to negotiate hundreds of contracts involving approximately 80 different properties between February 5 and February 9, and (ii) bidders would not be able to bid with any level of comfort that competing bidders were not bidding on different, more favorable contracts. This clearly would have chilled the bidding. In addition, had the bidding proceeded based on separately negotiated contracts, it would have been far more difficult to select winning bids for the reason that the Debtors and the Court would have had to sort through varying lease terms in order to evaluate any number of factors other than purchase price. As an example of just one of the scores of possible variances, what if one of the competing bidders negotiated representations and warranties while another did not? The Debtors and the Court would have had to determine how much the representations and warranties decreased the value of the bid. Even with contractual uniformity in bidding, it was extremely difficult to resolve all issues prior to the Debtors' loss of bank financing. Absent contractual uniformity, it is frankly doubtful whether this auction process could have worked at all.

The "counter-offer" argument thus must fail. As noted above, the Debtors had no authority to negotiate the terms of the Lease Assignment submitted with Gelman's bid. In all events, even absent the Bidding Procedures, Gelman's argument could not succeed under common law contract principles.[7] Gelman's so-called "counter-offer" argument rests on a February 7 letter from Debtors' counsel, advising Gelman that they were correcting the exhibits

[7] None of the cases cited by Gelman arise in a bankruptcy or bankruptcy auction context. All are common law contract disputes, for which there were no prior court orders controlling the contract and process. See Gelman Mem. at pp. 7-8; 12-13.

attached to the Lease Assignment submitted with Gelman's bid. This letter did not alter or address any of the terms of the Lease Assignment, and certainly did not alter any material terms. It therefore cannot be characterized as a "counter-offer" which could serve to release Gelman from his "offer". See Knapp v. McFarland, 344 F. Supp. 601, 613 (S.D.N.Y. 1971) (immaterial deviations from original offer do not constitute counteroffer); Schoenfeld v. Masucci, 205 A.D.2d 749, 750, 613 N.Y.S.2d 682, 683 (2d Dep't 1994) ("immaterial modification of post-closing indemnity provision did not render the agreement ineffectual or make the acceptance a rejection and a counter-offer"); Denton v. Clove Valley Rod & Gun Club, Inc., 95 A.D.2d 844, 845, 464 N.Y.S.2d 203, 204 (2d Dep't 1983) (modifications which merely clarify terms already agreed upon and do not qualify essential terms of the contract do not constitute a rejection and counteroffer). The February 7 letter merely notified Gelman (i) that he did not attach the correct Exhibits A and E to the Lease Assignment (which are the lease and title documents respectively), and (ii) that the paragraph in Exhibit C that intended to transfer tradenames being sold with a lease was being stricken, as there were no tradenames being sold with the lease on the Property. Rich Aff. ¶ 4 and Exh. B. These ministerial changes brought the contract into conformity with the Court-approved form Lease Assignment and did not alter the contract signed by Gelman in any material way.

Indeed, as the Court is well aware, the Debtors received hundreds of bids on more than 80 properties within less than a week before the Auction. The Debtors undertook an extraordinary effort to review every bid, make sure each was in conformity with the Court's instructions, and prepare each for the auction in the event that the bidder became the Successful Bidder. Rich Aff ¶ 3. The Debtors were not renegotiating contracts or seeking to invalidate bids,

but rather were implementing the Bidding Procedures by fixing mistakes, omissions and variations. It is only after the fact that Gelman is distorting these efforts beyond their reasonable interpretation in an effort to avoid the obligations that accompanied his bid.[8]

Thus, there was no "rejection" of or "counteroffer" to the Lease Assignment, and Gelman is bound by his bid and the Bidding Procedures.

B. Gelman Defaulted

Gelman's various "notice" arguments are either factually inaccurate or nonsensical. See Gelman Mem. at pp. 9-13. Gelman essentially argues that, although his default is undisputed, he should not be bound by the consequences of it because he did not thereafter receive written notice of various events and no court order approving the sale to him was entered.[9]

This argument, like the prior one, ignores the bankruptcy auction context of this transaction. He had notice of his obligations and of the consequences of default by the very terms of the Bidding Procedures, and no further notice was required. Moreover, although not required, he did receive notice verbally from Debtors' counsel of the facts that his deposit was at risk and that Debtors were remarketing the Property.

Notably, there is no dispute that Gelman defaulted on his bid and was not going to close. He advised the Debtors both in writing and verbally that he was withdrawing his bid and

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[8] It is undisputed that Gelman did not respond to the February 7 letter, or raise any objection to it at the time. Rich Aff. ¶ 5. Nor would one expect any objection, as all that was done was to attach the correct exhibits to the contract.

[9] Notably, Gelman does not contend that he did not receive notice of his default and the consequence thereof from Debtors' counsel -- he merely complains that he was not "sent" notice. Gelman Mem. at pp. 9-10.

would not honor it, and at no point, either in correspondence, in telephone calls or in his lengthy motion papers, has Gelman ever wavered from that position. By revoking his bid, he breached the Bidding Procedures, which declared all bids irrevocable. From that point forward, he was in default, he had forfeited his deposit, and the Debtors were stuck scrambling to find a new buyer before their financing expired and the site was closed.

Defaults and deposit forfeitures are controlled by Paragraph 21 of the Bidding Procedures, which makes it clear that, contrary to Gelman's contention, no court order is required for such a forfeiture to occur. It states:

> "Upon failure to consummate a sale of some or all of the Assets after the Hearing because of a breach or failure on the part of the Successful Bidder(s) with respect to such properties, the party making the Back-up Bid, as disclosed at the hearing with respect to some or all of such Assets, shall be deemed the Successful Bidder without further order of the Court, and shall proceed to Closing no later than ten (10) days following the date [o]f default by the original successful Bidder. The Debtors shall be entitled to retain the Deposit of any Successful Bidder and such Deposit shall be deemed forfeited by such defaulting Successful Bidder and shall not be credited against the purchase price." (Emphasis added.)

This paragraph provides that a back up bidder becomes a Successful Bidder "without further order of the Court". This clear language thoroughly disposes of Gelman's argument that a Court order was required before he could be deemed a Successful Bidder or required to proceed. See Gelman Mem. at p. 10.[10]

Similarly, nothing in paragraph 21 or elsewhere in the Bidding Procedures supports the absurd argument that the Debtors were required to go through the charade of

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[10] The Bidding Procedures notified all bidders that hearings would be held on February 14 and February 16, 2001. Gelman evidently failed to attend either.

obtaining a court order, and preparing documents for, and setting up a closing with, a bidder who has announced that he will not close. See Gelman Mem. at pp. 11-12.[11] The forfeiture of the deposit is triggered by the Successful Bidder "defaulting," meaning that there has been "a breach or failure on the part of the Successful Bidder(s) . . .". Nothing in the Bidding Procedures limits a default to circumstances where an order is obtained, a closing is scheduled, and the bidder does not appear. Indeed, paragraphs 14 and 17, the purported authority relied upon by Gelman for this argument, merely state that all assignments are subject to Court approval, and are silent with regard to who is a Successful Bidder, what constitutes a default, and when deposits are forfeited. Under the Bidding Procedures, Gelman's written and oral advice to the Debtors that he withdrew his bid is a "breach or failure on the part of a Successful Bidder," resulting in forfeiture of his deposit.

Moreover, Debtors had no obligation under the Bidding Procedures to send a "notice of default," "notice of forfeiture" or notice of a closing (assuming one had to be scheduled

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[11] Such a futile exercise would have been a complete waste of the Debtors' resources and the Court's time, and would have made it impossible to dispose of the Property in the timetable required by the circumstances. By this line of thinking, one must suppose that the Debtors would have had to go through the same fruitless steps with the highest bidder as well before legitimately determining him to be in default and turning to Gelman as the back up bidder. Nothing in the bidding rules, or even in common law assuming it applied to this context, would require such steps to be taken. A party to a contract is relieved of the obligation to perform futile or useless acts, including the provision of notice, upon the failure or refusal of the other contracting party to honor its obligations. See, e.g., Wolff & Munier, Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir. 1991) (party relieved of obligation to give 2-day notice to cure, as compliance would have been futile given defendant contractor's abandonment of job); Caisse Nationale de Credit Agricole v. CBI Industries, Inc., 90 F.3d 1264, 1275 (7th Cir. 1996) (under New York law, party had no obligation to give notice that it considered defendant's unambiguous notice of repudiation to be a repudiation; compliance with notice provision would have been futile); Special Situations Fund III, L.P. v. Versus Technology, Inc., 227 A.D.2d 321, 642 N.Y.S.2d 894, 895 (1st Dep't 1996) (a party is relieved from performance of futile acts upon the failure or refusal by a party to honor its obligations under their contract).

for him, which it did not). The Bidding Procedures themselves establish the irrevocability of the bids and the forfeiture of deposits upon breach by a Successful Bidder, and nothing requires written or other notice from the Debtors.[12] Indeed, such notice would be superfluous where, as here, a Successful Bidder provided verbal and written notification of his intention to breach the rules and not honor his bid.

Finally, Gelman's oft-repeated mantra that the Debtors, or our firm, should not have "submitted" Gelman's bid at the open outcry auction on February 9 (see, e.g. Kook Aff. ¶ 6 (iv) and ¶ 33) is inaccurate and turns the facts on their head. It was Gelman who submitted his binding and irrevocable bid; neither the Debtors nor their counsel submitted any bids at any time. This argument is a distraction from Gelman's fundamental problem here, i.e., that his bid was binding and irrevocable upon its submission.

A similar "red herring" argument is made at ¶ 21 of the Kook Aff., i.e., that by making immaterial corrections to his bid, the Debtors rendered it no longer a "Qualified Bid" and that "only 'Qualified Bids' could be submitted at the Auction". First, whether or not a bid was a "Qualified Bid" is irrelevant to whether it is binding – all "Bids", as defined in the Bidding Procedures, are binding and irrevocable, and all deposits are at risk. Second, as noted above,

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[12] In fact, however, Gelman received notice of the status of his bid, of his default, of the forfeiture of his deposit from the Debtors. Debtors' counsel advised Gelman's attorney of the status of his bid on February 15, when he told Gelman's attorney that the highest bidder was defaulting, in which case Gelman, as Back-up Bidder, would be assigned the lease. Moreover, during subsequent conversations Debtors' counsel advised Gelman's counsel that Gelman's deposit was in jeopardy as a result of his repudiation of his bid. Rich Aff. ¶ 9. To the extent, as alleged, that Keen Realty did not notify Gelman that he was a qualified bidder prior to the auction, Gelman was not prejudiced by such event since noone bid on the Property at the auction. The highest and back-up bidders were determined from the written bids received beforehand, which were irrevocable.

neither the Debtors nor counsel submitted any bids at the open outcry auction, and no bidding occurred on February 9 on the Property.

The fact is that Gelman changed his mind, for whatever reason, about his desire to acquire the lease after he had submitted his binding, irrevocable bid. Now he is making hyper-technical arguments to try to justify his conduct and avoid the consequences of it. This effort cannot succeed. Gelman knew he was submitting an irrevocable bid and that his deposit could be forfeited if he did not honor it. By choosing to revoke the bid, he must now live with the consequences – the forfeiture of his deposit.

C. Sanctions Should Not Be Imposed In This Case

As a result of the foregoing, there is clearly no basis to impose sanctions upon Debtors' counsel. Nor can there be liability based upon the handling of Gelman's bid deposit, as it has been maintained in escrow since it was received.[13] There is no evidence that Debtors' counsel engaged in any improper conduct with regard to its handling of these funds, let alone "willful misconduct, gross negligence or bad faith," the only grounds for potential liability for the handling of bid deposits under the Bidding Procedures. See Exh. 1 hereto at ¶ 12.

[13] Debtors' counsel had no obligation to place the deposit in an interest-bearing account, and thus his demand for interest is moot.

WHEREFORE, the Debtors respectfully request that Gelman's motion be denied in all respects.

Dated: New York, New York
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